

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA,)

4 Plaintiff,)

5 v.)

6 PIROUZ SEDAGHATY, et al.,)

7 Defendants.)

) No. 05-60008-2-HO

) March 1, 2011

) Eugene, Oregon

8
9 TRANSCRIPT OF ORAL ARGUMENT

10 BEFORE THE HONORABLE MICHAEL R. HOGAN

11 UNITED STATES DISTRICT COURT JUDGE

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ALSO PRESENT: Colleen Anderson
David Carroll

1 (Tuesday, March 1, 2011; 1:58 p.m.)

2 P R O C E E D I N G S

3 THE CLERK: This is the time set for Case
4 05-60008, *United States of America versus Pirouz*
5 *Sedaghaty*, time set for oral argument on motion for
6 discovery Number 520.

7 THE COURT: Counsel, first, I want to apologize
8 for being late. I had a little additional preparation I
9 wanted to do to make sure I was really ready for you, so
10 I took the freedom to do it. I hope you understand.

11 All right. I'm familiar with the materials you
12 have. I've read them all. And happy to hear any
13 comments you wish to make at this time.

14 Let me just also add that I've read not only
15 the discovery materials but there have been -- there is
16 a motion for new trial and dismissal and so on, and I've
17 read all that material also.

18 MR. WAX: Well, Judge, in very brief form, I
19 think that what we're dealing with here is most unusual.
20 I think that in our most recent pleading, we pointed out
21 that with respect to some of the law that is applicable,
22 you do find that the parties are in agreement as to some
23 of what is applicable. And even under a standard that
24 says in a rare case only should the court grant
25 discovery, we think this is a rare case.

1 The record includes the government's admission
2 that it withheld material to which Mr. Sedaghaty was
3 entitled, and that is a relatively unique factor. I
4 don't think that we found that circumstance in -- I
5 don't want to say in any cases, certainly, it is far
6 outside the norm.

7 THE COURT: Let me make sure I understood that.
8 When we had the motion on the release hearing, I tried
9 to be precise on this point because one of the things
10 that your pal here said was of concern to me, and it
11 sounded like he was saying that the prosecutors knew
12 that certain reports hadn't been turned over. And
13 that's why I came back at it a few times. But I may
14 have been imprecise in the words I used. I haven't
15 looked back at the transcript. And, frankly, I thought
16 it was a serious statement to say that the prosecutors
17 here knew that there was exculpatory material that they
18 hadn't turned over. And is there something in this
19 record that would show that?

20 MR. MATASAR: Your Honor, I have read the
21 transcript and the question --

22 THE COURT: Sure.

23 MR. MATASAR: -- you asked me was -- I think
24 there was a statement in our papers, I don't have them
25 right here, our supplement --

1 THE COURT: I don't either, and it was
2 occasioned by the statement in the papers.

3 MR. MATASAR: The statement said something like
4 the prosecutors were aware that Richard Cabral was paid
5 cash. And I think you asked me how did I know that, and
6 I explained that. So when you are saying today a
7 slightly different question, were the -- which one way
8 of looking at it is, did the prosecutors
9 intentionally -- were they aware of something and then
10 decide not to hand it to you. That's a different
11 question than the question you had -- that I had stated
12 in the pleadings and that I was responding to. I just
13 want to make that clear.

14 THE COURT: Thank you for the clarification. I
15 want to make sure I understood your position on that.
16 That's why I asked the questions before.

17 MR. WAX: Your Honor, what the declarations
18 that were filed on November -- or, excuse me, February
19 18 recite is that in January and March of 2009, the
20 trial team, the two case agents and the two trial
21 prosecutors, met and reviewed material, and they
22 discussed what would be disclosed.

23 What I believe is said in those declarations is
24 that there can be no question but that they were aware
25 that Richard Cabral had been paid. There is no question

1 that the case agents knew that Barbara Cabral had been
2 present. There is no --

3 THE COURT: On the '05 payment?

4 MR. WAX: Correct. And a decision about
5 discovery on what would be turned over was made.

6 We were not provided the reports that included
7 the Richard Cabral payments or the report or notes that
8 said that Barbara Cabral was present on one occasion.

9 Now, in terms of the question that you just
10 asked a moment ago, those are the facts that the
11 government has presented to date with respect to those
12 meetings. What we believe is required at this point is
13 further exploration through the -- what the materials
14 we've requested, the notes, the memos, the e-mails,
15 et cetera, the communications among those four people
16 and others in the FBI and others in the United States
17 Attorney's Office.

18 THE COURT: I want to make sure that we're very
19 clear about this, because I have --

20 MR. WAX: Yes.

21 THE COURT: -- some lawyers in front of me
22 we've spent our whole careers together, all of us, and
23 everyone here has my highest respect for their
24 integrity, and I hope that I have the same in return.
25 But if there really is an allegation or a question about

1 assistant attorneys not turning over *Brady* material that
2 they knew about, it wasn't turned over, then that can be
3 a different question than whether some things were found
4 later.

5 MR. WAX: Your Honor, there is no question that
6 in the declarations Agent Carroll and Mr. Gorder both
7 describe the meetings that they had with Barbara Cabral,
8 and the descriptions include conversation between the
9 two of them about Cabral's -- was Barbara Cabral paid?
10 Gorder to Carroll.

11 Carroll, no. I am considering, thinking of
12 paying her.

13 Gorder, don't pay anything until after the
14 trial.

15 Now, given the fact that the declarations state
16 that a year, a year and a half earlier, there were
17 discussions about the payments to Richard and, from
18 Agent Carroll, the source files, which as we understand
19 it should include the detail of the payment, were
20 present in Medford when the four of them met for
21 multiple days in January and March --

22 THE COURT: I haven't been precise enough.
23 Please turn to paragraph 15 of Mr. Gorder's declaration.

24 MR. WAX: I have it in front of me.

25 THE COURT: Where he describes the week of

1 December 27th, 2010.

2 MR. WAX: Yes.

3 THE COURT: And says down eight or nine lines,
4 I did come across handwritten notes for September 28,
5 2004, interview by the FBI. I made further inquiries,
6 et cetera. Do you have any indication that Mr. Gorder
7 or anyone else -- any other lawyer for the government
8 knew that notes such as that were not made available to
9 you?

10 MR. WAX: The only information we have, Your
11 Honor, is the statement by Agent Carroll that the source
12 files were present in Medford on the days in January and
13 March of '09. We have the record of the discovery that
14 the government provided to us. And that record, of
15 course, shows that we were not provided information
16 about the payments and other information.

17 It seems to me that there is some inconsistency
18 between Agent Carroll's declaration that the source
19 files were present and Mr. Gorder's declaration.

20 THE COURT: With all respect, I don't think you
21 are answering my question. Do you have any information
22 that a member of the bar -- I take that back. Some FBI
23 agents are lawyers. That the Assistant U.S. Attorney
24 knew that there were these handwritten notes that
25 Mr. Gorder says that he found during the week of

1 December 27th, any indication that they knew those were
2 available and didn't turn them over?

3 MR. WAX: Could I have a moment, please?

4 THE COURT: Of course.

5 (Discussion held off the record between Mr. Wax
6 and Mr. Matasar.)

7 MR. WAX: Your Honor, the only information that
8 we have is the information that is currently before you.

9 THE COURT: Go ahead with the rest of your
10 argument.

11 MR. WAX: In terms of the, you know, *Brady*
12 issue, what the agent knows the prosecutor is deemed to
13 know.

14 THE COURT: I realize where the buck stops, I
15 get that.

16 MR. WAX: And with respect to that particular
17 statement, I put it into the context of what seems to me
18 to be the inconsistency between what appears in the
19 different declarations about what was present and/or
20 what was reviewed. And if there is a question of
21 someone forgetting something, that's one thing. If
22 there is a question of someone not asking the question,
23 that is something else. And I think that those are the
24 types of issues that the court needs to resolve and that
25 the court can only resolve after having the opportunity

1 to look at all of the communications that are, we
2 believe, extant. Mr. Gorder has told you in his
3 declaration a list of things that he reviewed prior to
4 preparing. We don't have similar lists from the other
5 declarants, but I think it's reasonable to assume that
6 they reviewed similar materials.

7 And in a case of this nature, with the amount
8 of time and energy that went into it, I think that it is
9 reasonable for us all to assume that each of the
10 participants was making the types of notes and logs that
11 some have described as having reviewed and that others,
12 we have evidence of some of them before us.

13 We recognize, Judge, that these are not --
14 these are unpleasant matters. Nobody wants to be making
15 an allegation or suggesting that an area needs to be
16 inquired into that involves the integrity of people with
17 whom we work all the time. Regrettably what we have in
18 front of us starting with the admission that something
19 was not turned over, and then looking at what has been
20 provided, as we see it, it raises further questions that
21 require inquiry, and there is some statements that are
22 just not reconcilable without looking at additional
23 material.

24 And what we're seeking is the opportunity to
25 look at that material, to test these recollections, to

1 inquire into the inconsistencies, armed with the
2 necessary material, and to do it through an evidentiary
3 hearing after we've had that stuff provided.

4 I'm not sure that there is much more to say
5 about that. The only other point that I think might be
6 worth emphasizing is that in terms of the legal
7 standards, what it is that the court is dealing with,
8 the questions before you are entirely distinct from the
9 types of questions that arise in the normal pretrial
10 discovery phase of the case. The questions that must be
11 answered now are which members of the prosecution team
12 knew what when and said what to whom when? Those
13 questions involve a different paradigm, if you will,
14 than the types of issues that are discussed in the
15 traditional discovery cases.

16 And the government's pleading approaches this
17 as a discovery matter in the context of the normal
18 pretrial discovery process or in a setting in which the
19 defense has no basis on which to be suggesting that any
20 constitutional rights have been intruded upon. We have
21 that here. We have the first leg in the government's
22 admission stuff wasn't turned over. We have the second
23 leg in what it is that they have now provided in these
24 declarations. And what we're seeking is to complete
25 that picture.

1 And Rule 16(a)(2), the work product privilege,
2 we think the Supreme Court hit it head-on in the *Nobles*
3 case when it said once you put the integrity of your
4 office, if you will, on the line, and the integrity of
5 your actions on the line, you cannot say that work
6 product protects the very documents that are needed to
7 determine precisely what the truth is.

8 And the government's pleadings, we do not
9 believe, recognize that we are dealing with that very
10 different type of situation.

11 THE COURT: Thank you. Ms. Zusman.

12 MS. ZUSMAN: Thank you, Your Honor. I think at
13 the outset I'd kind of like to -- I appreciate that the
14 court has read all of our pleadings, and so I'm not
15 going to repeat any of that. I think it's helpful to
16 kind of get a frame of reference as to what we're
17 talking about here with the defense's discovery request,
18 and the first is that they haven't said any of their
19 discovery requests relate to their new trial motion.
20 New trial stands or falls on really your determination
21 about whether or not that Barbara Cabral was a key or a
22 star witness, and whether or not any of the information
23 we provided posttrial about the payments to her deceased
24 husband Richard or the comments that Agent Carroll made
25 to her before trial, whether any of that matters.

1 That's something that you can decide right now with what
2 you have before you.

3 The discovery request instead relates to the
4 defendant's attempt to accuse the trial team of
5 outrageous or flagrant government misconduct. And what
6 they want us to do is open up our files, provide them
7 with our trial strategies and our work product at a time
8 when we have this new trial motion pending, and show
9 them everything we have. Not appropriate. And they
10 haven't met the threshold that would entitle them to
11 that kind of extraordinary relief.

12 Couple of points there. The inconsistencies
13 that Mr. Wax has noted between the declarations, I am
14 probably to blame for those. And that's because I told
15 each of these four individuals not to talk to each other
16 when they prepared those declarations. My instructions
17 to them were to prepare their declarations based on
18 their own memory and whatever material that they had
19 would help refresh their memories, so that what they
20 were providing you was something helpful and not just a
21 bunch of "I don't know," "I don't remember," because I
22 was asking them to go back several years in a very -- in
23 a case that involved a lot of discovery, thousands of
24 pages, I wanted them to tell you what they did in terms
25 of their good-faith efforts to comply fully with the

1 rules that apply to discovery, from the Criminal Rules
2 of Procedure, from the due process clause, and from this
3 court's orders, and they did precisely that. They
4 didn't confer amongst each other, they didn't collude.
5 I think it's entirely reasonable to expect that the
6 declarations that they provided are going to differ in
7 what they remember and what they may have emphasized.

8 Now, when Mr. Wax talks about an inconsistency
9 about what took place in Medford when they were
10 reviewing the files and they are doing this scrub in
11 order to make sure that they turn everything over, and
12 Mr. Gorder outlined for you all of the exculpatory
13 material that they culled and they produced to the
14 defense. So the notion that somehow we're going to hold
15 back on the payments made to Richard Cabral years after
16 he died in order to gain some sort of tactical advantage
17 simply doesn't make sense.

18 But leaving that aside, if we go back to
19 this -- when we're doing the March 2009 review, Agent
20 Carroll brought the information about Richard Cabral,
21 and both Mr. Cardani and Mr. Gorder what they tell you
22 with their declarations is, look, it may have been
23 there, I don't remember. My only memory was Richard
24 Cabral was dead in 2009, so we knew we weren't going to
25 be calling him as a witness.

1 Now, Mr. Wax has told you that this is a rare
2 case, one in which you should order this extraordinary
3 discovery and have us clear out our files and show you
4 all of our trial strategies and show it to the defense,
5 but why is it a rare case? He tells you it's a rare
6 case because of our declarations, because we have
7 candidly come forward and admitted, not a *Brady*
8 violation, as they've said in their reply, we have
9 admitted that there was material about one of our
10 witnesses that should have been disclosed, but
11 disclosure is a far cry from admissibility, and an even
12 further cry from a *Brady* violation. And we have never
13 conceded a *Brady* violation.

14 They have also told you that we waived our
15 privilege under Rule 16(a)(2) by filing those
16 declarations. And they cite you to the Supreme Court's
17 decision in *Nobles*. False. Absolutely false.

18 Prior to filing those declarations, we asserted
19 our privilege under Rule 16(a)(2) in the response that
20 we filed to their discovery requests.

21 And, second, the Ninth Circuit in *Fort* tells
22 you that *Nobles* was not a 16(a)(2) case. It involved
23 the work product privilege. And 16(a)(2) is broader
24 than that.

25 So for all of these reasons, Your Honor, there

1 is no basis for you to -- there is -- I would suggest
2 there is no basis to grant the defendant's request for
3 this extraordinary discovery that they have asked for.

4 Now, one final point, they have raised a claim
5 in their reply brief that Agent Carroll violated FBI
6 policy in making the payments to Richard Cabral. We
7 think that's irrelevant, but even if it was, they
8 submitted to you just a couple of hours ago this
9 declaration of James Wedick, a former FBI agent. He
10 retired in April of 2004. Now, that was just about the
11 time that the policy that was in place when Agent
12 Carroll first made the payment in July of 2004 came into
13 effect. So agent -- former Agent Wedick wasn't around
14 when the policy was in place that applied to Agent
15 Carroll's actions.

16 If this court has any questions or any concerns
17 at all about what that policy was, because Agent Wedick
18 does not address it, I have it for you here in court,
19 and I can make it available to you in camera. I will
20 tell you I have reviewed it, and nothing in the policy
21 that applied to Agent Carroll was violated. I will also
22 tell you it is sensitive, it is not public material.

23 And for all of these reasons, the defendant's
24 discovery motion should be denied. And we should simply
25 move on to this court's consideration of the motion for

1 new trial.

2 THE COURT: Thank you.

3 MR. WAX: A couple of points, Your Honor.

4 First, Ms. Zusman is, in her argument, significantly
5 overstating our discovery request. We are not asking
6 the government to open its files. We are not asking the
7 government to open its files and discuss trial strategy
8 with us, or to look into why and how they prepared this
9 case.

10 Our discovery requests are very narrowly
11 tailored to the issues before this court. All that we
12 are seeking are the copies of the relevant guidelines
13 from the Department of Justice and the FBI. We have
14 access to some that are in the public record. We do not
15 have access to them all. The ones that are available to
16 us say to us that if they were applicable, and one I
17 think is from 2001, which would be applicable, perhaps,
18 and the other from 2006, that there -- they were not
19 complied with.

20 Depending on what those guidelines say, it is
21 a -- one of two things appears to be the case if either
22 of the guidelines that we have access to are applicable.
23 Either the FBI did not comply with the guidelines, and
24 there is a potential for an outrageous conduct dismissal
25 based on that, or if they did comply with the

1 guidelines, then somebody in the United States
2 Attorney's Office was in a position where he or she
3 would have to have signed off on the payments that were
4 made to Cabral. We seek that type of information.

5 We seek information with respect to the Cabrals
6 and the communications about the Cabrals and the
7 payments to the Cabrals. Our discovery requests go no
8 further than that.

9 THE COURT: Also A.U.S.A. communication about
10 those with them, right?

11 MR. WAX: Excuse me?

12 THE COURT: Also AUSA communication about those
13 and with those witnesses.

14 MR. WAX: Yes, Your Honor, yes. Our requests
15 are related solely to the issue that we see that is
16 before the court. Did Mr. Cardani, did Mr. Carroll, did
17 Mr. Gorder, did Ms. Anderson, communicate with each
18 other or take notes at the time of the payments?

19 Is there an e-mail from Dave Carroll to Chris
20 Cardani in 2005 discussing this?

21 And if that type of e-mail exists, you need to
22 see that to know whether or not the government's
23 attorneys knew certain things that their declarations
24 say they did not. Perhaps they have forgotten. But
25 that's different than not having known. And there would

1 be other inquiries that would need to be made.

2 If there is a log note in Mr. Cardani's file
3 from 2006 about communication with Agent Carroll, about
4 Richard or Barbara Cabral, it seems to me you need to
5 see that.

6 That's the only type of information we're
7 requesting.

8 With respect to the 302s, you have a position
9 taken by the agents that we respectfully submit is on
10 its face something that must be questioned further.
11 They tell you that the version of the FBI 302 of the
12 August 17, 2007, interview of Richard Cabral is a draft.
13 Yet when you look at the 302 that was provided earlier,
14 the 302 that was provided later, and the handwritten
15 notes that are provided later but were apparently made
16 contemporaneously, you see that both 302 reports contain
17 statements not present in the other.

18 It is difficult for us to understand why a
19 statement that is in what is called the draft, the later
20 discovered report, Summer Rife came from Alaska, which
21 is in the handwritten notes, if that's a draft, why is
22 it removed from the final version of the report?

23 The handwritten notes have the numbers --
24 dollar values 200 and 400, that's the handwritten notes.
25 That's what is in what is called the draft. Yet the

1 final version has 1 and 200. So on its face, calling
2 one a draft and calling the latter discovered one a
3 draft, just is not consistent with the other facts that
4 are before you.

5 Agent Carroll says in his declaration, he
6 affirmatively states, I didn't save that electronically.
7 Your Honor, he referred at one point to a telephone log.
8 He looked at it for an October 4 conversation, says I
9 have a telephone log, I know this conversation with
10 Barbara Cabral took place on October 4. If he has a
11 telephone log, why is he not able to tell us when the
12 other conversation that he says he had with Barbara
13 Cabral took place with similar precision? Does he have
14 a log that tells him that he forgot to hit "save
15 electronically"?

16 We all know from this case that computers
17 contain a lot of information. And the FBI computer may
18 well provide clarity to what, on its face, is
19 inconsistent in what has been said. That's the type of
20 thing we're seeking, not trial strategy, not the inner
21 workings of the government in terms of putting this case
22 together, only on this subject matter.

23 THE COURT: Anything further?

24 MR. MATASAR: Your Honor, let me address the
25 *Fort* case. Counsel says it's not a 16(a)(2) case. This

1 is about waiver. She says it's not a 16(a)(2) case. We
2 said that we're keeping our privilege, therefore, it's
3 inapplicable. But in our view, Your Honor, *Fort* is a
4 logical and clear way to resolve this problem of waiver.

5 The court said, as she indicates, Rule 16(a)(2)
6 is not strictly speaking a work product privilege, but
7 the court says, therefore, we look for guidance to the
8 general principles of waiver. And that's all we're
9 saying, the general principles of waiver. They looked
10 at the phone logs, they looked at their files, they
11 looked maybe at their e-mails, I can't recall exactly
12 what they said they looked at, they relied on all of
13 that information to create -- and they talk all about
14 their internal team meetings, they gave us information
15 about all of those internal team meetings. In our view,
16 if you look at the general principles of waiver, that's
17 a waiver. That was our point.

18 THE COURT: Go ahead if you have something.

19 MS. ZUSMAN: Thank you, Your Honor. Very, very
20 briefly. The work product privilege that we have
21 asserted as to the documents that the lawyers, in
22 particular, relied upon in preparing their declarations,
23 Mr. Gorder, in fact, relied upon many of the trial
24 strategy notes that he had in order to help him remember
25 the sequence of events. So if they want to look at

1 everything that Mr. Gorder relied upon to prepare his
2 declaration, that is going to get us into what's
3 critical trial strategy.

4 The other thing I would offer to the court is
5 that if you are concerned about anything that they have
6 raised here today, I personally have been through every
7 single scrap of paper that Agent Carroll, Assistant U.S.
8 Attorney Cardani and Assistant U.S. Attorney Gorder had
9 that they used to help them remember the sequence of
10 events in order to draft their declarations. I can make
11 it available to the court to review in camera.

12 I can tell you, though, that in reviewing all
13 of the documents that they have, and just to quickly
14 answer the suggestion about Agent Carroll's phone log,
15 he had a few notes on a notepad of a few phone calls.
16 It was never intended to be a complete summary of every
17 single phone call he had made, and that's why he
18 attempted to determine when that call took place with
19 Barbara Cabral, but he couldn't, he couldn't be more
20 specific, I've got the log, I've got the notes. I can
21 tell you that in reviewing all of this material, all of
22 it is entirely consistent with what each of these
23 individuals has said in their declarations. But if
24 there is any doubt at all in the court's mind, it's
25 here, and I can make it available to the court.

1 I don't think it should be given to the
2 defense. They haven't made a showing that there is any
3 outrageousness, any bad faith on the part of this trial
4 team.

5 THE COURT: Anything further?

6 The record is important here, so I'm going to
7 do this in writing. I think it's wise for me to go
8 ahead and review the material and the FBI policy that
9 you have in camera. And so I'll require that.

10 With regard to when I would hope to have an
11 order out, because I have to go to -- right now I'm
12 scheduled to be in San Diego on Thursday and New York on
13 Friday through Tuesday, and so while I have some pretty
14 strong thoughts about how this may happen, depending on
15 what I see, maybe there is some other questions, I'm
16 going to try to get something out right away on this,
17 but right away is not going to be tomorrow.

18 And what I would like to do is address
19 scheduling a little bit, though. I don't want this to
20 drag on forever, either we're going to have another
21 trial or we're not, and we need to get that addressed.

22 So I want you to assume for a minute, and if it
23 comes out differently, when I've reviewed other
24 materials, that's fine, assume I deny the motion for
25 discovery, when are you ready to argue the motion to

1 dismiss and for new trial?

2 MR. MATASAR: Your Honor, we'd like to be able
3 to submit our reply to the government's response, so I
4 think that would be the next date. Probably -- I said a
5 time at lunch that was too soon, so I want to consult
6 here to make sure we can ask for the right time.

7 (Discussion held off the record between Mr. Wax
8 and Mr. Matasar.)

9 MR. MATASAR: How about, Your Honor, just two
10 weeks after your order? Whenever you issue the order,
11 we'll have our reply within two weeks, because that will
12 tell us whether we're getting discovery or not, and then
13 we'll figure out how to deal with it.

14 THE COURT: Well, I'm going to make it ten
15 days.

16 MR. MATASAR: Fine.

17 THE COURT: And I'll give the government a week
18 to respond, and we'll set the motion after that.

19 MR. MATASAR: Great.

20 THE COURT: And what -- in that regard, a
21 question I would like -- you've already addressed it
22 somewhat, certainly it's addressed somewhat in the
23 government's brief, a question I have that could be
24 significant here is whether -- on the testimony of
25 Barbara Cabral, whether it has more to do with

1 willfulness or as compared to the terrorism enhancement
2 that the government is seeking on sentencing, because
3 that's a question I have. Two separate questions to me.

4 All right. Yes.

5 MR. PAPAGNI: On the materials that Ms. Zusman
6 offered, we intended to give the court everything so
7 that the record -- you review everything in camera to
8 verify Ms. Zusman's records as well as the trial team,
9 that's what you want, right?

10 THE COURT: Yes. And then it will be sealed
11 and made part of the record. All right.

12 MR. WAX: Will there be a log or index of all
13 of the material, Your Honor, in the event that there is
14 a need for appellate review of this?

15 THE COURT: I haven't seen it.

16 MR. WAX: I guess what I'm requesting is that
17 you request that the government provide, so that we can
18 know, you know, if you are getting 26 e-mails or if you
19 are getting no e-mails. Because we do not know from
20 what Ms. Zusman has said whether they are going to
21 provide you with any e-mails. And I think it's --

22 THE COURT: Well, why don't you provide me --
23 I'd like to go ahead and take the materials so I can
24 start work on it. And can I do that and you still give
25 me something, would be also in camera, that would just

1 sort of summarize what I have, documents I have, just so
2 that there can be -- if someone wants to read these
3 later on, they can, and make sure they know they're
4 looking at what I'm getting today.

5 MS. ZUSMAN: Your Honor, I think we can prepare
6 an index, but we would need -- I brought the originals
7 with me. If we could have just this afternoon to
8 prepare an index --

9 THE COURT: Of course.

10 MS. ZUSMAN: -- and then deliver them to you
11 right away.

12 THE COURT: That's fine. No problem. Anything
13 else today?

14 MR. WAX: Judge, I have to say this, I'm sorry,
15 and that's this: We had suggested to Ms. Zusman and to
16 Dwight Holton that the United States Attorney's Office
17 for the District of Oregon should not be handling this
18 matter. And I need to raise that issue with the court.
19 I appreciate that Ms. Zusman is handing up a stack of
20 material. It seems to me that given the nature of the
21 issues that the court must resolve, some independent
22 entity must be involved in taking a look at the totality
23 of the communications that exist in this matter within
24 the FBI, the IRS, and the U.S. Attorney's Office, and
25 that that cannot be someone from the U.S. Attorney's

1 Office here in the District of Oregon. And to the
2 extent that I need to put that in the form of a motion
3 to you to recuse the office, I'm doing so.

4 THE COURT: If you wish to, that's fine. I'm
5 not going to act on an oral statement at this time. I'm
6 going to try to look up the law on things first before
7 we give them the order.

8 All right. Anything further? All right.
9 Thank you. We're in recess.

10 (The proceedings were concluded at 2:36 p.m.)
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1 CERTIFICATE

2 I, Deborah Wilhelm, Certified Shorthand Reporter
3 for the State of Oregon, do hereby certify that I was
4 present at and reported in machine shorthand the oral
5 proceedings had in the above-entitled matter. I hereby
6 certify that the foregoing is a true and correct
7 transcript, to the best of my skill and ability, dated
8 this 2nd day of March, 2011.

9
10
11
12 /s/ Deborah Wilhelm

13 _____
14 Deborah Wilhelm, RPR
15 Certified Shorthand Reporter
16 Certificate No. 00-0363
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